Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

In Re: Gerald L. Brumley

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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54 pp

QUESTIONS PRESENTED

1. Where a judgement of an Appeals Court is the direct fruit of false statements by the prevailing party, is that judgement nullified by irrefutable showing of the falsity and materiality of the false statements?

2. Where a judgment is void as the fruit of fraudulent statements, should the judiciary prevent the fraud feasor from future enjoyment of the illicitly obtained judgment, such as res Judicata reliance on the judgment the court was duped into handing down?

3. Does the Hazel-Atlas Glass Co. v. Hartford Empire Co. Standard for fraud upon the Court oblige the court which was duped to exercise its powers under rules of equity to grant relief from fraudulently gained judgment?

4. Where a person has been certified by a responsible agency as entitled under statutory provisions to a certain monetary benefit, and said agency then withholds the payment of those benefits for no stated reason, does withholding that certified entitlement, without justification infringe upon the entitled person's property rights under the Constitution?

5. Does the Eighth Circuit internal operating procedure providing for non argument decisions to be made unilaterally by a person in the Clerk's office rather than by unanimous consensus of a three judge panel as called for by Rule 34 of the Federal Rules of Appellate Procedure violate the due process clauses of the Constitution?

6. Does the Eighth Circuit internal operating practice excluding pro-se litigants from oral argument, without notice, and on the ground only of their pro-se status constitute a deprivation of due process and of equal protection under the law?

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Petitioner, Gerald L. Brumley, respectfully prays that a writ of certiorari issue to review the judgement of the United States Court of Appeals for the Eighth Circuit[1] wherein the Court of Appeals denied, without opinion, a petition for extraordinary writ in the nature of error coram nobis and Audita querela.[2] Jurisdiction is claimed pursuant to Title 28 U.S.C. § 1254(1) Petitioner presented a credible showing

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[1] An enlargement of time to July 1, 1998 in which to file this petition was granted by Mr. Justice Clarence Thomas. The text of the notification by the Clerk of Justice Thomas' enlargement is attached hereto as Appendix-A.

[2] The text of the one sentence Judgment of denial is attached hereto as Appendix-B.

that an earlier judgement[3] adverse to petitioner had been the fruit of false statements and fraudulent information placed before that court by a U.S. Department of Labor ("DOL") attorney and another DOL employee in collaboration with that attorney. Credible evidence of the falsity of the statements of that DOL attorney and her confederate was in the form of an official U.S. Government document made by superiors of those fraud perpetrators, said official statements made to the Office of Management and Budget in a White House meeting at a time subsequent to the Federal Circuit's reliance on the fraudulent representation of the DOL attorney and her confederate; and said official statements by superiors of the DOL attorney and her confederate source attesting to facts absolutely contradictory to the false statements made by the DOL attorney and her confederate in the litigation preceding the petition for extraordinary writ.

-I-
STATEMENT OF THE CASE

Petitioner made a credible showing that the judgment of the U.S. Court of Appeals for the Eighth Circuit in case # 93-3051 was controlled by reliance on false information. The common law doctrine of error coram nobis recognizes that where a fraud has been practiced on the court and a judgement won there was on the strength of the court's

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[3] Per Curiam Order of the Eighth Circuit Court of Appeals in case # 93-3051 entered on June 16, 1994. The text from that decision is provided as Appendix-C attached hereto. It should be noted however that petitioner disputes several assertions of the court such as the representation that petitioner presented a "violation of clear statutory mandate argument" in conjunction with the Secretary's lack of authority to require earnings reports; and the Courts assertion that petitioner had been asked to fill out a Form CA-8 and had refused. Both of those characterizations of fact are incorrect.

reliance on that false information, such illicitly gained judgement and opinion is a nullity. The question is, whether or not the court which was so duped is obligated to rectify its mistake, or whether the court may simply stonewall it and arbitrarily let the illicit judgment appear to the world to have been a legitimate judicial holding. Moore's federal practice states a scholarly distinction for such circumstance, to wit:

> " ... if the federal judgment is valid and has not been reversed or otherwise set aside or its enforcement enjoined, it must be given effect in the court which rendered it and in any other federal court, when it is properly pleaded or its effect is otherwise appropriately presented." ..." A void judgment is something very different than a valid judgment." ..."The void judgment creates no binding obligation upon the parties or their privies; it is legally ineffective."

The scholarly concept is clear, but Courts can not be compelled to comply with scholarly concepts. Where, as here, the doctrine of coram nobis is ignored and an illicitly gained judgment is allowed to stand or to continue to have the appearance of a legitimate judgement, it raises the issue of whether there is no longer to be protection for the victimized party from the success achieved in an adversarial forum by reliance on fraud and deceit. On March 3, 1998, four work days after the petition for Coram Nobis relief was submitted to an unidentified panel of judges, the clerk entered a Judgment denying the petition without any statement of rationale, or identity of the judicial authority which purportedly directed that it be entered. There is no information available as to whether a panel or one judge decided the matter; or whether the proof of fact was considered lacking; or whether the materiality of the proof of fact to the prior decision was disputed; or anything else about why the Circuit Court chose to stand on its prior decision despite the showing that it was

the fruit of false information placed before the Court by opposing counsel.

If the concept of coram nobis is to be abandoned in one circuit, it may thereafter be abandoned in other circuits as well. The issue now placed before this court seeks national guidance on whether a court which has fallen victim to false information and relied on it, and produced a ruling which is undeniably the result of judicial reliance on fraudulently presented information, is obligated by concepts of equity, upon becoming aware of the fraudulent underpinning of its judgment, to correct the error and withdraw the illicitly gained fraud feasor's victory. Failure to correct a ruling resulting from a misplaced judicial confidence in the veracity of an officer of the court perpetrating such a fraud on the court, not only grants such officer of the court the unjust victory, but equips that lawyer with an avenue to thereafter trade upon the illicitly gained ruling under the guise of the doctrine of res judicata.

While doing so is actually perpetration of a new fraud on the court in which res judicata is invoked, as long as the originally duped court stands by its erroneous holding, other courts are likely to regard it as unimpeachable. In point of fact, the DOL attorney having lied to the Eighth Circuit and told it that there was a "need" for a certain filing of information to be more thoroughly discussed below; and having succeeded, in deceiving the Eighth Circuit into believing that such "need" existed; gained the advantage of a dicta remark by the Eighth Circuit that

"the DOL needed the information".

Since that time, the same DOL attorney has repeated the falsehood to the Fifth Circuit and enhanced it with a showing that the Eighth Circuit said "the DOL needed the information", and therefore under res judicata the Fifth circuit is obligated to accept that as judicially decided (and the Fifth

Circuit did).[4] The fraudulent representation can be repeated and relied on by the perpetrators of the original fraud unless and until the court in which they practiced the original fraud is willing to face up to the fact that it accorded judicial notice to a presentation of evidence that was not from a source which was authoritative and unimpeachable and thus of a stature which warranted judicial notice, but instead was a false representation and not even credible. The Hazel-Atlas v. Hartford Empire standard established by this Court in 1944, 322 U.S. 238, obligates the court that issued a judgement founded on fraudulent information, under rules of equity, to grant relief from such judgment as "manifestly unconscionable".

Petitioner believes that the appeals court's refusal to nullify such illicitly obtained victory of the government upon being furnished clear and convincing proof of fact of the false statement of government counsel, rises to the same level that is labeled "stonewalling" when an Executive Branch functionary refuses to correct a prior error, or to say why it should not be corrected. Further, petitioner respectfully suggests that withholding of such corrective process infringes upon petitioner's due process rights under the United States Constitution.

-II-
HISTORY AND DISCUSSION

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[4] There was a significant factor differing in that Fifth Circuit representation however, in that it was made even after the Top level DOL authorities had officially declared to the Office of Management of budget that there is no requirement for the CA-8 form to be filed by persons not still employed by the Federal Government. Thus that attorney had even more reason to be absolutely cognizant of the fact that she wa. presenting false information to a Court.

Petitioner is a 65 year old former federal employee who is both retired under the Federal Employee Retirement Act (FERA) and entitled to injury compensation under the Federal Employee's Compensation Act (FECA). The monetary advantages of FECA are significantly greater than those under FERA. but under the provisions of the two statutes, each of which prohibit receipt of both at the same time, petitioner is required to forego receipt of money benefits under one, while he elects to receive payment under the other[5]. This election of benefits can be changed at any time at the entitlee's sole discretion, for any designated period of time, either prospectively or retroactively[6]. When such election is made for a retroactive period, the United States Department of Labor who administers the FECA and the Office of Personnel Management who administers the FERA are required by their respective regulations to settle accounts with each other for the period of time in question, and then the balance of the entitlement for the specified period (if any) is required to be remitted to the entitlee.

When petitioner originally retired from the Federal Aviation Administration, he was awarded and began to draw a

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[5] The deferment of receipt of the money from one program or the other does not in any way affect the other entitlements under that program. That is, for instance, while electing to not receive the money from FECA for a given period of time, the entitled person remains entitled to the medical benefits, travel expenses, vocational re-training and other features of the FECA. Thus the court should understand that forgoing receipt of the periodic payments does not disqualify the claimant from entitlement under the program.

[6] Petitioner's right to make the election at his sole discretion has been attested in a DOL official's sworn affidavit to be discussed further infra, and has been entered as an unappealed finding of fact by the District Court level in the litigation underlying this petition.

retirement annuity in 1974. At a later time, the U.S. Department of Labor ruled that petitioner was entitled to FECA injury compensation. Petitioner then elected to receive the FECA injury compensation, and DOL reimbursed the OPM (then Civil Service Commission) for annuity payments made up to that point in time, and remitted the balance to petitioner. Petitioner continued to receive the FECA compensation until late 1982 at which time the Department of Labor (illicitly) alleged that petitioner was no longer entitled to the compensation. Upon withdrawal of the FECA compensation payments, petitioner filed for the FERA annuity payments, and the OPM complied. In late March of 1984 the Director of FECA at the Department of Labor in Washington, sua sponte vacated the withdrawal of petitioner's injury compensation and held that petitioner remained entitled to the injury compensation payments. The regional office level of DOL in Dallas. Tx failed to restore the payments the FECA Director in Washington thus certified as a due. In essence, the functionaries at the Dallas office simply did not comply with the dictate of their Washington superiors, and ultimately petitioner brought suit to compel the performance of a duty unlawfully withheld or unreasonably delayed. The Department of Labor never answered that complaint, but instead began a series of ex-parte communication with the judge wherein DOL agreed that the payments were due, and that they were willing to pay the compensation and were moving ahead to do so. Judge Henry Woods of the Eastern District of Arkansas then entered an order on December 13, 1984 that the government agreed that the entitlement existed and that they were willing to pay it, and that they therefore were ordered to do so.

The DOL then issue payment to the OPM in early 1985 reimbursing that agency for all payments of retirement annuity made from the late 1982 annuity reinstatement date to

that January, 1985 point in time, and issued a check to petitioner for the $20,000 +/- difference. At that time, petitioner had been encouraged by attending physicians to find some way to distance himself from the running battle with the Dallas, Texas DOL functionaries. Accordingly, petitioner, having established as a matter of law that the FECA entitlement existed, and the prior DOL compensation order withdrawing it had been vacated, elected at that time to change back to the OPM annuity.

In conjunction with the just mentioned DOL correspondence to Judge Woods, Mr. Frank Allen, the District Director of the Office of Worker's Compensation Programs ("OWCP") in Dallas had filed a sworn affidavit with the Court which inter alia swore that Gerald Brumley was entitled to the injury compensation as of the November 25, 1984 date of that affidavit;

> "and continuing thereafter ... for as long as Gerald L. Brumley is found to be disabled under the Federal Employee's compensation Act".

That sworn testimony establishes beyond any doubt, a point of beginning for a period during which petitioner's entitlement to the injury compensation is indisputable.[7]

There came a time in April of 1988, in conjunction with litigation over certain records which petitioner sought to have corrected under the Privacy Act, that the same Dallas, Tx District Director of OWCP, Mr. Allen, filed another affidavit with the Court (dated April 7. 1988) wherein he swore under oath that as of that point in time Gerald Brumley continued to be entitled to FECA injury compensation.[8] The second

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[7] A copy of Mr. Allen's November 25, 1984 sworn affidavit of petitioner's entitlement is attached as Appendix-D to this petition.

affidavit also establishes

- That all rights and duties vested in the Secretary of Labor by the FECA (for the geographic area involved) have been exclusively delegated to the affiant therein.
- That petitioner's January 19, 1985 election to receive OPM annuity instead of FECA injury compensation can be changed by petitioner at any time at petitioner's sole discretion.
- That all FECA claimants (such as petitioner) have the right to change election of benefits from retirement to compensation at any time retroactively or prospectively.

It is thus established that the official determination of the person to whom all rights and duties vested in the Secretary of Labor by the FECA have been delegated; that petitioner indisputably has entitlement to the compensation payments between November 25 1984 and April 7, 1988, and is entitled at any time to claim those compensation payments by simply electing to do so.[9]

On or about February 28, 1991 petitioner informed DOL that he elects to receive the FECA compensation payments for a period beginning in January of 1985 through

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[8] A copy of Mr. Allen's April 7, 1988 sworn affidavit of petitioner's entitlement is attached as Appendix-E to this petition.

[9] As a point of clarification, petitioner continues to have that entitlement even to this date, but no election to receive compensation for a period of time beyond the date of Mr. Allen's last affidavit has been filed by petitioner. Therefore, compensation payment entitlement after the April 7, 1988 affidavit is not at issue and should not have been an issue in the federal circuit, but it is apparent from the Circuit Court's musings that the Court was presuming some deliberative function to be necessary to ascertain petitioner's FECA entitlements as of the time of the Circuit's decision and thereafter.

December of 1987 (a period well within the time frame for which the two sworn affidavits of Mr. Allen certifies petitioner to have entitlement to compensation payments and the right to receive them at any time at his sole discretion.[10] Petitioner believes that such certified entitlement establishes a property right in those statutorily conferred entitlements. The Dallas, Texas District Director and his subordinates simply did not respond in any way to petitioners election of benefits, despite several follow up letters, the last of which specifically inquired as to whether or not there was anything else that DOL required petitioner to do or any further information DOL needed from petitioner. DOL simply would not respond. Finally, petitioner brought suit seeking to have the U.S. District Court for the Eastern District of Arkansas ("EDAR") compel the performance of a duty unlawfully withheld or unreasonably delayed. No one from the Dallas OWCP office or anywhere else within the chain of delegation of authority for administration of the FECA ever, to this day, has offered any reason for not implementing petitioner's election of benefits. However, there came a time during the course of litigation when an attorney in the Dallas DOL Solicitor's office and a confederate in the Washington Office (not within the delegation of authority chain, although she falsely stated in her declaration that she was) presented false information to both the District Court and to the Eighth Circuit, designed to justify the withholding of petitioner's money on a "clean hands" basis. The Judiciary embraced those falsehoods as fact and approved of the withholding of petitioners money on a stated rationale that petitioner had failed in an obligation to complete some forms and in doing so had deprived the DOL of information it needed to accomplish the implementation of petitioner's election of benefits. The truth is, that the allegation of there

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[10] (less reimbursement to OPM for any annuity payments received during that period)

being an obligation to fill out the subject form was a false representation of counsel. The allegation of there being some need for information upon which the DOL would predicate some deliberative activity in order to disburse what they had already certified as petitioner's entitlement with right to elect to receive it at petitioner's sole discretion, was false.

The fraud which the DOL attorney and her confederate perpetrated was almost an exact parallel to the government behavior condemned by the U.S. District Court for the District of Utah in Bulloch v. United States, 95 F.R.D. 123 . In that case, the government's false and deceptive misrepresentations and manipulating the process of the court was judicially condemned as fraud upon the court of the most egregious nature because the government enjoyed a virtual monopoly of knowledge in comparison to that independently available to the plaintiff sheep owners, their attorneys and indeed, the Court ... Id at 144. Such was also the case here.

What government counsel knew, but the court didn't, and petitioner was prevented from proving because of the government's control of the evidence, was that while there is a provision in the code of federal regulations at 20 CFR §10.122 which calls for the filing of a certain form known as a CA-8 Form on a bi-weekly basis, that requirement applies only to current federal employees, and not to those ex-federal employees who have been separated from service due to compensable injury. The provision requires current federal employees to file the CA-8 "claim for continuing compensation" every two weeks while recuperating, so that DOL can track their recovery and their eventual return to work. That provision does not apply to persons who experience long term disability, and are therefore separated

from Federal Employment.[11] At the time of separation from service, such long term disability persons are specifically instructed by written instructions to thereafter not send in that "claim for continuing compensation (unless specifically instructed at some future time to do so). Petitioner is such a long term disability case, and was so specifically instructed to not send in CA-8 forms anymore unless requested. The government admits that it did not either solicit such a submission or furnish such a form to be filled out in conjunction with the subject election of benefits (even when petitioner sent them a letter specifically asking if there was anything else he should do or any other information they needed in order to process his election of benefits). There is no evidence of record that expectation of a CA-8 Form was a condition of mind or otherwise was the motivation for inaction of the Claims Examiners. But, the government attorney lied to the court and told the court that petitioner was obligated to have been sending in a CA-8 Form every two weeks; had failed to do so; and accordingly had obstructed DOL's ability to honor his election of benefits by depriving them of information they needed in order to administer the FECA. The proof of fact that those attorney representations were false was not available at the time, but has since become available in the form of official statements made by DOL superiors of the attorney and her confederate, to the Office of Management and Budget in a White House meeting.

DOL counsel had pulled an eleventh hour maneuver at the District Court level by presenting a sworn declaration from Ms. Susan Rydalch of the DOL Washington Office which was

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[11] When a person is separated, they are no longer "federal employees", but instead become "members of the public". See definitions of the distinction between the two classes of persons in the Paperwork Reduction Act to be discussed infra.

false, and both the district court and the court of appeals relied on it as authoritative. In the declaration, Ms. Rydalch swore that she was in a supervisory capacity over the OWCP claims examiners who had handled petitioner's case, and that is false. Ms. Rydalch was in fact, a supervisor, but not one with authority over claims officials as she attested under oath. Ms. Rydalch supervised a staff of technical writers in the Washington Office, and in fact is not anywhere within the line of delegation of authority for administering the FECA.[12] Answers to interrogatories by Ms. Rydalch's superiors in the Washington Office in a later separate litigation establishes her real organizational assignment, contrary to what she said in her declaration. On the strength of Ms. Rydalch's false representation, the Federal Circuit looked upon her as an expert in FECA claims administration, and as corroboration of the DOL attorney's fraudulent assertion that persons in petitioner's circumstance were required to fill out the form CA-8 when making an election of benefits. Subsequent to the incorrect holding of the Federal Circuit in this matter, official statements at the OMB in the White House were presented there by Ms. Rydalch's superiors which state conflicting information to that urged upon the Court by Ms. Rydalch. One of the DOL officials making that White House Presentation was Mr. Dennis Mankin, Executive Assistant to

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[12] The delegations of authority for administering the FECA are in writing, and run from the Secretary of Labor to the Assistant Secretary for Employment Standards, thence to the Director of the Office of Worker's Compensation Programs, and thence to the Regional Directors for Worker's Compensation Programs. The written delegation specifically states that the relationship between the Regional Directors for Workers Compensation Programs and the Director of the OWCP in Washington is a direct one, (not delegated through any subordinate line or staff organization). Thus Ms. Rydalch's assertion that she has line authority over FECA administration is false. See also the Allen affidavit attesting that all rights and duties vested in the Secretary of Labor for the administration of the FECA have been delegated to him.

the Director of Office of Worker's Compensation Programs, and his statement in conflict with his subordinate, Ms. Rydalch, are certainly the more authoritative.[13] As part of Ms. Rydalch's deception she had presented what purported to be a valid internal directive stating that persons making an election of benefits must submit a CA-8 Form. In reality, that directive had been a temporary trial process instituted for a one year test period some twelve years earlier, and had contained a mandate that it expired one year from date of issue and that it was to be destroyed by all recipients upon that expiration. Ms. Rydalch simply had not complied with the destruction order, and had squirreled away a copy of that directive in her private collection, and then pulled it out eleven years after its expiration and foisted it off on the courts as a current policy of the DOL/OWCP.

The nation is gripped at this time in a struggle to determine whether the President and or Monica Lewinski and or Vernon Jordan made false sworn statements in a civil litigation, and a prosecutorial philosophy that to do so constitutes perjury, and if that perjury is suborned, the person who suborned it is guilty of obstruction of justice. Yet, there is no judicial interest in the Eighth Circuit in the false statements of the DOL attorney and Ms. Rydalch, nor in the attorney's collaboration with Ms. Rydalch to elicit support for the attorney's false representations to the Court.

The U.S. District Court for the Eastern District of Arkansas ruled that it lacked jurisdiction over petitioner's

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[13] Also participating in the White House meeting was Cornelius Donoghue, Deputy Associate Solicitor in the Office of the Solicitor of Labor. His support to the official presentation of the truth that the CA-8 Form had theretofore been applicable only to currently employed Federal Employees is certainly more authoritative than the contrary false statements invented by the staff attorney in the Dallas Texas Solicitor's Office.

complaint because of a statutory withdrawal in the FECA. The District Court reasoned that the only way petitioner could attack that holding, was to show either a conflicting constitutional mandate to the (alleged) statutory withdrawal, or to show some conflicting statutory mandate to the (alleged) statutory withdrawal. Petitioner took the matter on appeal to the Eighth U.S. Circuit Court of Appeals, but did not pursue the conflicting constitutional provision or the conflicting statutory mandate theory. Instead, petitioner challenged the very existence of any statutory withdrawal of jurisdiction for judicial review pertaining to persons in petitioner's circumstance. Petitioner is well aware that in 1945, the Congress of the United States passed emergency legislation to deal with some 800 special bill requests then pending to grant injury compensation to non citizens of the United States who had been in the employ of the U.S. Government and were taken prisoner and interred in Japanese Concentration Camps. The congressional intent that it be applicable only to non citizens injured on foreign soil was emphatically discussed on the floor of the House of Representatives, and may be seen at pages 7815 -7817 of the Congressional Record for July 19, 1945. The floor manager for the bill assured the House that the intent was for the provisions of Section 4 of P.L. 79-161, 59 Stat 503, to apply only to non citizens of the U.S. injured on foreign soil. The essence of said section 4 amended Section 42 of the FECA in such a way as to extend coverage to such non citizens in overseas locations, but with significant variation to the injury compensation entitlements from those enjoyed by U.S. Citizens. First, instead of the ministerial duty to pay compensation according to the hard and fast formula of compensation statutorily prescribed for U.S. Citizens, the amount to be paid to the non-citizens was left to the discretion of the Administrators of the FECA. Secondly, whatever such administration awarded to these non citizens, was made final and conclusive with no right of judicial review. The original

codification of that amendment was properly codified in the United States Code in a section clearly caption as pertaining to overseas employees. At a later time, in a general recodification, the codifiers moved the provision and made slight modifications to the language in such a way that gave the appearance of applicability to all FECA recipients. This Court, in Lindahl v. Office of Personnel Management, 470 U.S. 678 , 779-80 & n.13 made dicta comments about the general premise that Congress has the right to preclude judicial review when it sees fit, and petitioner here presents nothing in challenge of that judicial holding. As an example of an instance where congress had done so, the Court cited the FECA as a statute where Congress had used unambiguous and comprehensive language to declare the intent to preclude judicial review. Petitioner argued in the Eighth Circuit that while there is no doubt that this Court had cited the FECA preclusion of review as model language, this Court had said nothing that should be construed as overruling the intent stated in the Congressional Record that the provision of section 4 of P.L. 79-161, 59 Stat 503 was intended to apply only to non citizens of the U.S. injured on foreign soil. Petitioner argued that other courts having misconstrued the dicta of this court does not rise to the level of overcoming that congressional intent. Petitioner argued that it is not within the power of the codifier of the U.S. Code to change the impact of a statute from that declared to be the intent of the statute by the Congressional action. Petitioner argued that no session of Congress has ever enacted a statute precluding judicial review of U.S. Citizens under the FECA. Petitioner argued that no President has ever signed into law a statutory preclusion of judicial review for U.S. Citizen FECA claimants. Petitioner argued that therefore there is no statutory preclusion of judicial review applicable to U.S. Citizens under FECA, and that accordingly the U.S. District Court for the Eastern District of Arkansas erred when it held that it lacked

jurisdiction to review petitioner's complaint due to statutory preclusion of review.

The Eighth Circuit never examined, commented upon or otherwise addressed any of the just mentioned arguments. Instead, the Eighth Circuit began with the rationale that "since there is a preclusion of review", and then went to a conclusion that petitioner had not shown either a Constitutional mandate of a conflicting statutory mandate sufficient to override that (presumed) statutory preclusion of review. The Circuit Court was so committed to a view contrary to petitioner's claim that there actually has never been a statutory withdrawal of judicial review applicable to U.S. Citizen FECA claimants that the court would not even entertain petitioner's argument, and instead treated the appeal as if petitioner was asserting a claim of "circumstance sufficient to overcome" statutory withdrawal rather than the real appeal that there actually "is no" statutory withdrawal applicable to U.S. Citizen FECA claimants. Petitioner asserts that the Office of Law Revision Counsel erred in codification of the non citizen withdrawal of judicial review, and there has since been a judicial accretion applying that statutory withdrawal to U.S. Citizens as well. Petitioner implies no criticism of the judicial presumption that the withdrawal applied to all FECA claimants, where heretofore the distinction has not been prensented to the judiciary for determination. But, when petitioner did bring that distinction for determination of the law, petitioner was entitled to have the law examined and properly ruled on, and not to be barred from any consideration whatsoever simply in preservation of past judicial habit. The Circuit Court owed petitioner an examination of his basis for appeal as a matter of due process, and that was simply another element of denial of due process with which petitioner has been burdened throughout these matters. Actually, the Eighth Circuit's holding was that (on nothing stronger than the DOL attorney's assertion of a

petitioner obligation to file bi-weekly CA-8 forms and an alleged DOL "need" for the information on them) the DOL needs the information on the CA-8 forms .... and that therefore DOL requiring such information "does not violate a clear statutory mandate" which settles nothing about whether there actually is a statutory withdrawal of judicial review applicable to U.S. Citzen injured employees. Then somehow, in a leap of logic that is beyond petitioners imaginative powers, the Eighth Circuit then "affirmed" the Eastern District of Arkansas holding (that there was an existing preclusion of review), without addressing in any way where the court found statutory content, legislative history or any other information at odds with the question raised on the floor of the House as to whether the section under discussion applied only to non citizens injured on foreign soil, and the assurance by the floor manager of the bill that applicability only to non citizens was the intent of the section.

Petitioner brought the matter of the Eighth Circuit's failure to decide the matter brought on appeal, before this court's October 1994 term on petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit, in case # 94-862. This Court denied Certiorari. That ended petitioner's hopes of successfully electing the benefits DOL has repeated certified by sworn affidavit to be his due.

The matter was not further approachable, until the proof of fact that resulted from the DOL meeting with OMB at the White House was later obtained through a Freedom of Information Request. That proof of fact established, by direct statements presented there by both superiors of the DOL attorney, and by superiors of Ms. Rydalch, that the statements made by attorney averment and the Rydalch sworn declaration were false. The holding of the Eighth Circuit used language clearly excerpted from those false statements of the DOL

attorney. Thus, the doctrine of Error Coram Nobis arises.

To reach that avenue of relief, which is the only avenue of relief available for correction of this manifest injustice, petitioner had to find a way to get the U.S. Department of Labor to tell the truth about the applicability of the form CA-8 being only to current federal employees and not to persons such as petitioner who are "former" federal employees as the DOL attorney had told the Circuit Court.

The Paperwork Reduction Act, 44 USC §3501 et seq provides inter alia, that no agency of the Executive Branch may require ten or more members of the public per year, to fill out any form without first submitting that form for OMB approval and successfully gaining assignment of an OMB approval number, and the form must display that OMB approval number to be considered legitimate. The statute provides (under the caption of "Public Protection") that no person may be penalized in any way for failure to or refusal to fill out any form that does not display an OMB approval number. The "public Protection clause" does not apply to current federal employees, but does apply to retired or other former federal employees. (See definitions at 5 CFR §1320.7(n).) In sum then, if the CA-8 Form which had no OMB approval number (at that time), and was in fact (as the DOL attorney represented to the Circuit Court) being used in a manner that required all FECA compensation claimants including those on long term disability who were no longer federal employees, to fill out the CA-8 Form, this would certainly be more than ten "members of the public (i.e. former federal employees) being required to fill out the form. According to the U.S. Department of Labor "OWCP Annual Report to Congress FY-1994" (particularly table A-1 at page 34 therein), there were 51. 679 people on long term disability during the FY-1991 period. No one can deny that is more

than ten people per year, and if the DOL was really requiring all of those people to spontaneously send in a CA-8 Form every two weeks, it would have been soliciting, or requiring one million, three hundred forty three thousand, six hundred fifty four reports per year without OMB approval, a clear violation of the paperwork reduction act. Petitioner has always maintained that they really were not doing that, but the DOL attorney sold the Circuit Court a false bill of goods that such was the practice, and that petitioner was guilty of violation of such requirement and thus did not have clean hands in the litigation at bar. The Eighth circuit gave its blessing to the deprivation of petitioner's benefits as a product of that story. The definitions in the OMB regulations gives one of the definitions of "penalty" the "withholding of any entitlement or benefit". Clearly petitioner had been "penalized" by the withholding of the benefits already certified by sworn DOL affidavits to be his entitlement. While the Circuit Court seems to have been of a mind that petitioner had been asked to fill out the CA-8 form and had refused, that simply is inaccurate (even though under the paperwork reduction act, refusal to fill out such a bootleg form with congressionally mandated immunity from penalty would have been petitioner's right) In truth, petitioner was never asked to fill out that form in conjunction with this election of benefits. In fact it should be noted that petitioner, as a last ditch effort to exhaust administrative avenues before litigating the matter, specifically asked DOL, in writing, if there was any further information he needed to provide, or any further action he should take in order to have the DOL move on his election of benefits, and DOL simply would not answer.

As just stated, petitioner knew that DOL does not really require CA-8 forms from former federal employees. In the actual circumstance that petitioner knew to exist, the CA-8 form really did not require an OMB approval number because

it was used only on current federal employees, and forms used only to collect information from current federal employees are exempt from the PRA. However, petitioner was faced with the contrary false representations by the DOL attorney and the judicial reliance on those false representations. Therefore, petitioner informed OMB that DOL officials had asserted that it was requiring the CA-Form of tens of thousands of members of the public and that petitioner had researched the matter and determined that not only was no OMB approval number displayed on the form, none had ever been assigned by OMB nor even applied for by DOL. OMB challenged DOL on the possibility of a PRA infraction. A contingent of DOL officials made a visit to the White House on September 11, 1985 at approximately 2:00 PM and filed an official government document with the OMB explaining that there had been no use of the CA-08 form involving anyone other than current federal employees, and thus the PRA had not been violated.[14] Petitioner agrees, but that is not what the DOL attorney and her confederate told the Eighth Circuit and what that court relied on. Of note is the fact that the contingent of DOL officials presenting the paper to the OMB included the highest ranking OWCP officials in DOL, as well as a representative of the Solicitor of Labor's office. There is therefore no possibility that the contrary allegations of DOL counsel and her confederate to the Eighth Circuit are more authoritative.

The information presented to the OMB is absolutely contradictory to allegations made in the courts by the DOL attorney.

- DOL told OMB that the CA-8 form is (as of that point in time and theretofore) required only of active

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[14] A copy of that DOL statement to OMB is attached hereto as Appendix-F.

duty federal employees (just as petitioner had asserted in judicial proceedings).
- DOL told OMB that when a person is placed on long term disability and separated from Federal Service, he/she is given specific instruction to not send in the CA-8 Form anymore (just as petitioner had asserted in judicial proceedings)
- DOL asked OMB to assign an OMB approval number to the CA-8 Form for subsequent use about 200 time per year in unusual circumstances where DOL has wrongfully withdrawn FECA benefits and is obligated to restore them (a circumstance which has nothing whatsoever to do with petitioner or with the litigation at issue).

Petitioner has been deprived of money that has already been officially determined to be his entitlement and thus is being deprived of a property right. Petitioner has been wrongfully accused of, and through judicial error adjudged to have been guilty of, either willfully withholding or negligently failing to provide information to the DOL which it needed. Petitioner has done absolutely nothing wrong and has failed in absolutely no obligation. DOL, since succeeding by fraudulent representation in convincing the judiciary in the Eighth Circuit that it "needed" the information on the CA-8 Form from all FECA entitlees every two weeks, has invoked Res Judicata status for the Eighth Circuit resulting utterance that "DOL needs the information". Where the judiciary has been duped by false representation, and the incorrectness of that representation has been irrefutably established, justice demands that the fruit of that misrepresentation be officially quashed, lest the practice of lying to the courts in order to illicitly gain an improper ruling becomes profitable and worthwhile to the party making such false representations.

Petitioner filed a petition with the Eighth Circuit, for extraordinary writ in the nature of Coram Nobis and Audita Querela. Petitioner provided clear and convincing evidence of the falsity of the representations made by DOL counsel there, and of the fact that the prior Eighth Circuit judgment was based solely on the Court's reliance on those false DOL attorney assertions. Four work days after the petition was filed in the Eighth Circuit, petitioner was sent a notification by the Clerk stating that he had been instructed by the court to enter a denial of the petition. No logic for the denial or any other information about the court's action or reasoning process, or indeed the identity of the judge or judges who had so instructed him was provided to petitioner.

-III-
DEPRIVATION OF DUE PROCESS AND EQUAL PROTECTION UNDER THE LAW:

Petitioner is a pro se litigant, and as such is subjected to deprivation of both due process and of equal protection under the law by Eighth Circuit appellate procedures. Rule 34 of the Federal Rules of Appellate procedure provides that "all parties" are entitled to oral argument except where one of three conditions exist. The first two, frivolity of the case and recent decisions dispositive of the issues are not germane to this claim of deprivation of due process and equal protection. The third condition allowing exception to oral argument entitlement is that oral argument may be withheld if under local rule, a three judge panel "after examination of the briefs and record" unanimously decides that there is such sufficiency of the briefs or the record, that oral argument is not needed. In that event, the FRAP requires that any such local rule, as a minimum standard, also provides "any party" an opportunity to file a statement setting forth reasons why oral argument

should be heard. That is the process that is due. It has been denied petitioner (as well as other litigants)

Clearly the minimum standard set by this Court, requires that deviation from the general rule of entitlement to oral argument, be protected from unilateral opinion of a lower court jurist. It may only be invoked by unanimous action of the three judge panel, and not even by a majority.

Because the operating practice actually employed by the Eighth Circuit is so far from the minimum standard set forth by FRAP 34, petitioner took the precaution of discussing the intent to lay this question before the Supreme Court in a telephone conversation with the Chief Deputy Clerk on May 11, 1998 to make certain that what petitioner describes hereinafter is an accurate description of the actual practices of the Eighth Circuit. The actual practice divides into separate procedures for represented parties and pro se parties.

The practice for represented parties involves a person in the clerk's office (not a Federal Judge) making the decision about whether oral argument is to be granted, and a suggestion of allocated time. Notice is then sent out to the representatives, who then have an opportunity under local rules (but not specifically stated in the notification) to object to the withholding of oral argument and to state the rationale for said objection. The objection to deprivation of oral argument is then decided by one or more judges. The Chief Deputy Clerk hastened to clarify that one of the panel judges may decide to override the clerk's office decision and want to hear oral argument even without a motion for an override. Thus, where Rule 34 is emphatic that the decision to withhold oral argument i s not even permissible by panel majority without unanimity of a three judge panel, the Eighth Circuit

allows a person who is not even a Federal Judge to unilaterally make that decision and the only time it is then overcome is if one or more judges of a panel elects to override that decision. (The Chief Deputy Clerk seemed to be impressed by the fact that such judicial override could be exercised by a single judge.) The practice in the Eighth Circuit therefore undeniably deprives litigants before it the process prescribed by rule 34 to be due "all parties". It follows that an internal practice which deprives parties of the minimum standard set by FRAP 34 is a deprivation of due process.

-IV-
DENIAL OF EQUAL PROTECTION UNDER THE LAW

As stated above, the process for litigation before the Eighth Circuit is distinctly different for represented parties and for pro-se parties. While rule 34 declares that "all parties are entitled to oral argument unless...", the practice in the Eighth circuit is that "all parties except pro-se plaintiffs are entitled to oral argument unless..."

Pro-se plaintiffs are categorically removed from consideration for the oral argument calendar and scheduled for decision. There is no consideration of the sufficiency of the briefs or sufficiency of the record, even by the unilateral decision of the clerical person or staff attorney, much less by a three judge panel. Pro-se plaintiffs just do not get oral argument and that is that. The Chief Deputy Clerk made much of an assertion that there had been a few cases in her memory where a pro-se plaintiff was allowed oral argument, and that was seemingly looked upon as evidence that all is well. It is not clear just what "rare circumstance" might give rise to a pro- se plaintiff being allowed oral argument.

The minimum standard specified in rule 34 is that any local rule allowing for three judge unanimous deviation from the oral argument entitlement must at least provide notice to the parties of the decision to withhold oral argument and must as a minimum, allow an opportunity for the parties to argue in favor of oral argument. As stated above, the practice in the Eighth Circuit does, for represented parties, involve notification of (the Clerk's office --- not a judicial panel) first impression against oral argument to the parties, and an opportunity for the parties to argue in favor of an oral argument opportunity. Not so for a pro-se litigant! A pro-se litigant gets neither a notification of being scheduled as a non argument case, nor an opportunity to present a showing of a need for oral argument. The pro-se plaintiff is simply sitting there waiting to be notified of the argument calendar, when out of the blue he gets a decision. Not only does the pro-se litigant thus experience deprivation of the process which has been set out as "due" by this court with congressional consent, but such litigant is so deprived simply because he is self represented, without any consideration of the factors of "frivolity", "recently decided issues", "sufficiency of the briefs" or "sufficiency of the record". This court, with congressional approval has described a minimum standard that is withheld from pro-se litigants because they are pro-se litigants. This is denial of equal protection under the law, as well as denial of due process.

Petitioner does not in the least, challenge the right of courts to make local rules setting forth a process for applying the provisions of the Federal Rules. Petitioner does however emphatically and directly attack the legitimacy of any local rule which either limits, or expands the scope of, the Federal Rules. The Federal Rules of procedure set down a process that is due a litigant, and deprivation of that process violates the Constitution of the United States.

On June 12, 1998, Mr. Justice Thomas appeared in Hot Springs, Arkansas as a speaker to the Arkansas Bar Association meeting. Mr. Justice Thomas' remarks were on the need for proper preparation and presentation of the case before the bar of justice. Justice Thomas emphasized the importance of oral argument as the element that often either makes or breaks a case. Petitioner would hasten to applaud Justice Thomas' views in that regard. For pro-se litigants to be deprived of the opportunity to function in an element of the litigation process which "may make or break his case" by effective oral argument, just as represented parties have that opportunity, not only falls short of the doctrine of equal protection, it constitutes a gross miscarriage of justice.

-V-
WHY CERTIORARI SHOULD ISSUE

There is no doubt that petitioner is entitled to the compensation, for the U.S. Department of Labor had considered that question and decided that petitioner is due the compensation and has on two occasion provided sworn testimony that petitioner is entitled to the compensation up to the instant of those affidavits and may simply call for the payment of it at any time at his sole discretion. There is no doubt that petitioner has called for payment of it. There is no doubt that the Department of Labor was informed of petitioners desire to have that money disbursed, and those officials within the chain of delegation of authority pursuant to the Federal Employee's Compensation Act simply did not answer or cite any reason why it should not respond. Thus, a citizen of this country is being deprived of a property right by his government, without justification either established or even alleged.

The false statement of the government attorney are now known to be false because the highest levels of the Office of Worker's Compensation Programs along with officials from the Solicitor of Labor's office and other Department of Labor entities have, subsequent to the entry of judgment by the circuit court, appeared at the Office of Management and Budget and told that White House Office that the Form CA-8 was not theretofore required of anyone other than active duty federal employees, and that on the basis of that declaration the DOL had not violated the Paperwork Reduction Act, because active duty Federal Employees are exempt from the PRA.[15] That is conclusive proof that the DOL attorney's story to the Circuit Court about petitioner, a person who has been retired and removed from Federal service, and placed on "the long term disability roll", having failed in a duty to provide a CA-8 form, and thus prevented DOL from doing its duty, is untrue.

There is something more important here than the deprivation of a right to this individual petitioner. This government attorney, with a co-conspirator has thrown a monkey wrench in the wheels of the judicial machinery, and unjustly obtained a favorable ruling by fraudulent behavior. Mr. Justice Black stated the concept that should apply here, very clearly and very emphatically in Hazel-Atlas Glass Co. v. Hartford Empire Co., 322 U.S. 238, to wit:

> "...tampering with the administration of justice in the manner indisputably shown here involves far more than injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public,

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[15] The PRA and its implementing regulations makes clear that "current employees" are excluded from the coverage of the PRA, but that "retired and other former federal employees" are included as persons from whom forms may not be required without OMB approval. See 5 CFR §1320.7(n)

> institutions in which fraud cannot complacently be tolerated consistently with the good order of society" id @ 246.

and

> "We hold therefore that the Circuit Court on the record here presented had both the duty and the power to vacate its own judgment and to give the District Court appropriate direction" id @ 249-250.

The Circuit Court, after vacating the wrongful holding of fault on the hands of petitioner, should then turn to the issue which was actually appealed, and consider petitioner's argument that while the codification of PL 79-161, 59 Stat 503 as enacted by the 79 Congress, 1st Sess on July 28, 1945, by its placement and use of codification language gives the appearance of being an across the board withdrawal of judicial review from all FECA claimants, the statute itself does not say that, and the legislative history clearly states that it is not applicable to anyone other than non citizens injured on foreign soil. This Court's expressed enthusiasm in Lindahl v. Office of Personnel Management, 470 U.S. 768, 779-80 & n.13 for the language used to enunciate that withdrawal from judicial review from non citizen federal employees does not mean that the language also applies to citizens of the United States, especially in the face of a clear understanding discussed on the floor of the House of Representatives that it would apply only to the non citizen class of persons. That was the issue brought to the Circuit Court on appeal, and it was not decided; was not discussed; was not even referred to by the Circuit Court. Petitioner should have his day in court to have that matter of law determined. If, as petitioner claims, there is no statutory withdrawal of judicial review, then the District Court erred in basing dismissal on the theory that it was precluded from judicial review by statutory withdrawal, and the Circuit Court must remand the matter to the District Court to be properly

tried there. This is the process that was derailed by the government attorney's success at misleading the Circuit Court into a belief that petitioner had failed in a duty and thus did not come to court with clean hands. Upon the clear showing that those counsel representations were false, and were the foundation upon which the Circuit Court fashioned its judgment, petitioner is entitled to have that judgement vacated, and to have the proper judicial process made available to him.

In deciding whether or not there ever was any statutory action passed by congress and signed by the President withdrawing judicial review from Federal Employee Compensation Act claimants who are U.S. Citizens, the parties should be allowed oral argument, as clearly the brief and the record were not sufficient for the Circuit Court to fathom the issues involved.

This Court should exercise its supervisory powers to require that the Eighth Circuit Court of Appeals come into compliance with Rule 34 of the Federal Rules of Appellate Procedure.

For the reasons stated above, a writ of certiorari should issue to review the Judgment of denial by the Eighth Circuit Court of Appeals of petitioner's Petition for Extraordinary Writ in the nature of Coram Nobis and Audita Querela in case # 98-1526 EALR on March 3, 1998.

Dated July 29, 1998

Respectfully submitted,

Gerald L. Brumley

Petitioner, pro-se

APPENDIX A

TEXT FROM THE NOTIFICATION BY THE CLERK OF THE SUPREME COURT OF MR. JUSTICE THOMAS' GRANT OF ENLARGEMENT OF TIME

Mr. Gerald L. Brumley
P.O. Box 190607
Little Rock, AR 72219

Re: Gerald L. Brumley
v. United States Court
of Appeals for the Eighth
Circuit
Application No. A-886

Dear Mr. Brumley:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Thomas, who on May 28, 1998, extended the time to and including July 1, 1998. This letter has been sent to those designated on the attached notification list.

Sincerely,
WILLIAM K. SUTER, Clerk
By
Melissa A. Blalock
Assistant Clerk

APPENDIX B

TEXT FROM
JUDGMENT OF DENIAL
FROM THE
U.S. COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 98-1526EALR

In re:	*	
	*	
Gerald L. Brumley	*	
	*	Petition for
	*	Extraordinary Writ
Petitioner,	*	

JUDGMENT

Petition for Extraordinary Writ of (sic) has been considered by the court and is denied.

March 3, 1998

Order entered at the Direction of the Court:

Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX C

TEXT FROM PER CURIAM DECISION OF THE U.S. COURT OF APPEALS FOR THE EIGHTH CIRCUIT IN CASE # 93-3051 UNDERLYING PETITION FOR ERROR CORAM NOBIS RELIEF

No. 93-3051

Gerald L. Brumley,	*	
	*	
Appellant,	*	
	*	
v.	*	Appeal from the
	*	United States
United States	*	District Court
Department of Labor,	*	for the Eastern
	*	District of
Appellee.	*	Arkansas
		(PUBLISHED)

Submitted: May 9, 1994

Filed: June 16, 1994

Before BOWMAN, LOKEN, and HANSEN, Circuit Judges.

PER CURIAM.

Gerald Brumley appeals from the district

court's[1] order dismissing his suit under the Federal Employees Compensation Act FECA), 5 U.S.C.§ 8101. We affirm.

Brumley filed a pro se complaint alleging that the Department of Labor (DOL), through the Office of Workers Compensation Programs (OWCP), failed to disburse FECA benefits for his disability. According to the complaint, OWCP accepted Brumley's claim of total disability and required him to choose either FECA benefits or Federal Employees Retirement Act (FERA) benefits. Brumley originally elected FERA annuity payments for the period of January 1985 through December 1987. Brumley then elected to receive, retroactively, FECA benefits for the same period, less reimbursement to the Office of Personnel Management (OPM) for the distributed FERA payments. Brumley alleged that OWCP did not acknowledge the retroactive election despite his successive demands. The DOL answered that Brumley did not comply with regulatory requirements in seeking to retroactively change FERA benefits to FECA because he did not complete form CA-8, required by 20 C.F.R. §10.122, on which a claimant must report his earnings.

The district court dismissed Brumley's claim for lack of subject matter jurisdiction. The court held that 5 U.S.C. § 8128(b) precluded review of

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[1]The Honorable Elsijane Trimble Roy, Senior United States District Judge for the Eastern and Western Districts of Arkansas.

final and conclusive actions of the Secretary unless DOL violated the Constitution or a clear statutory mandate. The district court found that DOL did not violate a clear statutory mandate by requiring an earnings report and, therefore, the court lacked jurisdiction to review the agency's regulatory requirement.

Section 8128(b) states: "The action of the Secretary or his designee in allowing or denying a payment. . . is (1) final and conclusive for all purposes and with respect to all questions of law and fact; and (2) not subject to review by another official of the United States or by a court by mandamus or otherwise." 5 U.S.C. 8128(b). The plain meaning of section 8128 shows Congressional intent "to bar judicial review altogether." Lindahl v. Office of Personnel Management 470 U.S. 768, 779-80 & n.13 (dictum referring to section 8128(b) as a model preclusion-of-review statute); see also, Waters v. United States, 458 F.2d 20, 22 (8th Cir. 1972). However, it has been held that the preclusion-of review statute cannot serve to immunize DOL from judicial review when its actions violate the Constitution or a clear statutory mandate. See Woodruff v. United States Dep't of Labor, 954 F.2d 634, 639 (11th Cir. 1992); Owens v. Brock, 860 F.2d 1363, 1367 (6th Cir. 1988); see also Merged Area X (Educ.) v. Cleland, 604 F.2d 1075, 1078 (8th Cir. 1979) (regarding Veterans Administration preclusion-of-review statute).

Brumley argues that 5 U.S.C. § 8105 does not empower DOL to require earnings reports or make wage earning capacity

determinations and, therefore, that DOL violated a clear statutory mandate by requiring him to disclose his earnings. Section 8105 does not expressly mention earning capacity or earning reports. Section 8105(a) defines FECA benefits: "If the disability is total, the United States shall pay the employee during the disability monthly monetary compensation, equal to 66-2/3 percent of his monthly pay. . . ." 5 U.S.C. § 8105(a) (emphasis added).

"Disability," in turn, is defined as "the incapacity, because of employment injury, to earn the wages the employee was receiving at the time of injury." 20 C.F.R. § 10.5(17). Therefore, the DOL needs the earnings information required on form CA-8 to assess an essential element of the claimant's continued disability: wage earning capacity. Thus, given its broad policy-making authority to administer and enforce FECA, the DOL's regulatory interpretation of section 8105(a) does not violate a clear statutory mandate. See Woodruff, 954 F.2d at 640. As a result, we agree with the district court that it lacked subject matter jurisdiction. Last, we deny Brumley's motion for oral argument.

Accordingly, we affirm the judgment of the district court.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX D

TEXT OF NOVEMBER, 1984
AFFIDAVIT OF FRANK ALLEN

I, Frank E. Allen, being sworn do say and depose that:

1. I am Frank E. Allen, Deputy Commissioner, of the Office of Workers' Compensation Programs of the United States Department of Labor, and that:

2. All rights and duties vested in the Secretary of Labor for the administration of the Federal Employees' Compensation Act (5 U.S.C. 8101, et seq.) have been delegated to me and that these declarations are based upon my personal knowledge or upon information furnished to me in my official capacity.

3. The records of the Office of Workers' Compensation Programs show that Gerald L. Brumley reaffirmed his election of benefits on October 7, 1984, which was received in this office on October 17, 1984.

4. That the Office of Workers' Compensation Programs contacted the Office of Personnel Management on October 18, 1984, to terminate Gerald L. Brumley and to advise the Office of workers' Compensation Programs of the amount to be reimbursed.

5. The Office of Personnel Managememt so notified this office that they would terminate Gerald L. Brumley from their rolls effective October 31, 1984.

6. Gerald L. Brumley was eligible to receive Office of Workers' Compensation Programs benefits beginning November 1, 1984, without fear of dual payment.

7. The Office of Workers' Compensation Programs will issue a payment on November 26, 1984, to cover the period November 1, 1984, to November 24, 1984.

8. Further, the Office of Workers' Compensation Programs has processed paperwork to begin Gerald L. Brumley on the periodic rolls effective November 25, 1984, and continuing thereafter each twenty-eight (28) days for as long as Gerald L. Brumley is found to be disabled under the Federal Employees' Compensation Act.

9. Upon verification by the Office of Personnel Management of the amount of benefits they paid to Gerald L. Brumley from November 4, 1982, until October 31, 1984, the Office of Workers' Compensation Programs will reimburse that agency for all monies paid by them and forward the balance to Gerald L. Brumley.

IN WITNESS THEREOF, Frank E. Allen executed this 7th day of November, 1984.

s/
FRANK E. ALLEN
Deputy Commissioner
Office of Workers'
Compensation Prcgrams

Subscribed and sworn to before me
this 7th day of November, 1984
s\
Goldie Smith
NOTARY PUBLIC

My commission expires 3/9/88

APPENDIX E

TEXT OF APRIL, 1988 AFFIDAVIT OF FRANK ALLEN

STATE OF TEXAS)
)
COUNTY OF DALLAS)

I, Frank E. Allen, being sworn do say and depose that:

1. I am the District Director, District 16, Office of Workers' Compensation Programs, Employment Standards Administration, United States Department of Labor.

2. All rights and duties vested in the Secretary of Labor for the administration of the Federal Employees' Compensation Act (FECA) (5 U.S.C 8101 et seq.) have been delegated to me and the declarations herein are based upon my personal knowledge or upon information furnished to me in my official capacity.

3. The records of the Office of Workers' Compensation Programs show that Gerald L. Brumley filed a claim for benefits under the FECA on August 14, 1974 on the basis of an occupational disease of emotional problems resulting from stress. On February 12, 1975 the Office of Workers' Compensation Programs (OWCP) accepted the condition of reactive depression and commenced payment of compensation for this disability on February 13, 1975. On January 19, 1985 Mr. Brumley elected to receive Civil Service retirement benefits

in lieu of OWCP compensation. However, he can at any time change this election.

4. Even though Mr. Brumley is currently receiving Civil Service retirement benefits, he remains entitled to medical treatment benefits under FECA as long as he has a work-related condition.

5. Under the FECA, entitlement to benefits is reviewed periodically. Assessments of degree of disability, potential for rehabilitation, and continued entitlement of compensation at the same rate or a reduced rate take into consideration impairments arising from work-related conditions as well as pre-existing impairments.

6. Mr. Brumley was medically evaluated in 1979 and 1980. In a report prepared by Dr. Charles Betts; dated January 12, 1979, Dr. Betts' diagnostic impression was that Mr. Brumley had a borderline psychotic personality disorder with some depression and conversion hysteria (conversion of his right arm), and some hysterical aphasia. Based upon Dr. Betts' report, the additional condition of disability due to the conversion hysteria affecting the right arm was accepted by OWCP.

7. Because assessments of FECA disability take into consideration both impairments arising from work-related conditions and pre-existing impairments, the limited use of the right arm and the medical records documenting this limitation are necessary for an accurate determination of continuing disability.

8. Removal of all references to Mr. Brumley's right arm would have the following effect on the current determination of his disability:

a. Since the conversion hysteria affecting his right arm was a part of his psychiatric condition, removal of all reports about his right arm would also remove reports about his psychiatric condition which served as the basis for his continued entitlement to FECA medical benefits. Moreover, removal of all references to the right arm would have the effect of modifying the basis of the disability determination itself.

b. Inasmuch as claimants have the right to change election of benefits from retirement to compensation at any time retroactively or prospectively, the information pertaining to the right arm is important in consideration of entitlement to FECA disability compensation.

In witness whereof, Frank E. Allen, executed this 7th day of April, 1988.

s\
FRANK E. ALLEN
Director, Office of
Workers' Compensation
Programs

Subscribed and sworn to before me this
7th day of April, 1988.

s\
JoAnn Murrell
Notary Public

My commission expires: 3-8-90

APPENDIX F

TEXT FROM
DEPARTMENT OF LABOR
WRITTEN STATEMENT
TO THE
OFFICE OF MANAGEMENT & BUDGET

Supporting Statement for Clearance of Claims Forms CA-7 and CA-8

1. The Office of Workers' Compensation Programs administers the Federal Employees' Compensation Act (FECA). The Statute provides for the payment of benefits for wage-loss and/or for permanent impairment to a scheduled member, arising out of a work related injury or disease. The Act outlines the elements of pay which are to be included in an individual's pay rate, and sets forth various other criteria for determining eligibility to and the amount of benefits, including: augmentation of basic compensation for individuals with qualifying dependents; a requirement to report any earnings during a period that compensation is claimed; a prohibition against concurrent receipt of FECA benefits and benefits from OPM or certain VA benefits; a mandate that money collected from a liable third party found responsible for the injury for which compensation has been paid be applied to benefits paid or payable. These forms request information, allowing OWCP to fulfill its statutory requirements, for period of compensation claimed (e.g., the pay rate, dependents, earnings, dual benefits and third party information). The CA-7 is used for an initial claim for

compensation; the CA-8 is filed for continuing compensation. The front page is completed by the claimant. On the back page, the employing agency verifies the accuracy of the claimant's statements and provides relevant information from agency records.

In the vast majority of cases, compensation is claimed while a claimant continues to be employed by the Federal Government. In those cases, the form is completed by a Federal employee and their supervisor, therefore not affecting the public. The form is required of a member of the public on rare occasions, such as when compensation is claimed after the claimant's Federal employment has terminated. It is estimated that approximately .5% [1/2 OF 1 %] of all claim forms filed are filed by claimants after leaving Federal employment. This request for clearance by OMB only pertains to about .5% of the overall use of these forms.

The appropriate sections of the FECA and the implementing Regulations are attached.

2. The information collected by the CA-7 and CA-8 is used by claims examiners for OWCP to determine eligibility for and the computation of benefits. With the medical evidence of file, it is used to determine whether or not the claimant is entitled to compensation for disability for work or permanent impairment of a scheduled member; the appropriate period, rate of pay, compensation rate, any concurrent employment or dual benefits, and third party credit. Without the requested

information, an eligible beneficiary could be denied benefits, or benefits could be authorized at an incorrect rate, resulting in an underpayment or overpayment of compensation. The CA-7 is generally filed only once for a particular injury. The CA-8 is filed every 2 weeks while disabled, until advised by OWCP not to file the forms until further notice. This advice is provided when the claims examiner determines, based upon an analysis of the medical evidence, to place the claimant on either the short term or the long term disability roll.

3. No improved information technology exists to reduce the burden of the respondents. The claimant must complete and sign the CA-7 or CA-8 affirming that the information submitted is true. The claimant is therefore legally responsible should it be determined that false information was purposely submitted, or that information was deliberately withheld, in order to receive compensation to which the claimant was not entitled. If the information was obtained via teleprinter or over the telephone, there would be no way to hold the claimant legally responsible, since the claimant would not have sworn in writing to the veracity of the information.

4. The information requested on these forms is not duplicative of any information available elsewhere. The claimant and employer are the only sources of the required information.

5. This information collection does not

effect small businesses.

6. If this information were not collected, or were collected less frequently, OWCP would be unable to properly provide disability benefits to injured Federal employee. If benefits were paid in the absence of full information, there would be numerous incorrect payments, creating overpayments, and depriving claimant's of benefits to which they are entitled.

7. There are no circumstances that require information to be collected that is inconsistent with the guidelines in 5 CFR 1320.6.

8. Recently, an extensive survey was conducted of agency personnel soliciting their opinion of the CA-7. Much of the language appearing on Form CA-8 was required y the Office of the Inspector General based upon their experience in Federal Courts in cases where claimant's had falsified earnings information.

9. The information collected by these forms is maintained in FECA claim files, which are fully protected under the Privacy Act.

10. Neither of these forms ask questions of a sensitive nature.

Mailing Cost: 400 x .32 = $1.28

Printing Cost: $ .25

Processing Cost:
Time to review each form - 1/2 hour

hourly wage of reviewer - $19.64
(GS-11/5)
400 responses X 1/2 X $19.64 -
$3,928
Total annual Federal cost $4.081

12. The claimant should have the information required by these forms readily available. It should simply be a matter of filling in the form. 30 minutes has been allotted for the completion of each form to include reading the instructions and providing all requested information.

CA-8 200 responses 1/2 hour 100 hours CA-7 200 responses 1/2 hour 100 hours
Total 200 hours

13. This is a new collection

14. Data collected with these forms will not be published.

Supreme Court, U.S.
FILED
JUN 30 1998
CLERK

No. 98-58

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

In Re: Gerald L. Brumley

ON PETITION FOR WRIT OF CERTIORIA
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

SUPPLEMENTAL APPENDIX
(by direction of the clerk)

APPENDIX G

Gerald L. Brumley
Pro-se
P.O. Box 190607
Little Rock, AR 72219
Phone (501) 847-0826

SUPPLEMENTAL APPENDIX

APPENDIX G

TEXT FROM ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

No LR-C-91-529

GERALD L. BRUMLEY,	*
	*
Plaintiff,	*
	*
v.	*
	*
UNITED STATES DEPARTMENT OF LABOR,	*
	*
	*
Defendant.	*

ORDER

By previous order, this Court has made a preliminary declaratory finding that the Secretary of Labor has no statutory authority under the Federal Employees Compensation Act to require earnings reports of persons, like

the plaintiff, who are in the total disability category. In subsequently filed pleadings, the government has asked the Court to reconsider this finding, as well [sic] the Court's earlier determination that it even has jurisdiction to consider the matter. The Secretary moves for dismissal, or alternatively, for summary judgment. Mr. Brumley urges the Court to stand by its previous determinations on both issues and also moves for summary judgment.

After careful reconsideration of the arguments of both sides, the Court now finds that it is without jurisdiction to consider plaintiff's claim. Accordingly, the defendant's motion to dismiss will be granted.

* * *

The Court sets out below some of the factual information found in the previously issued order:

The plaintiff is a person classified as having "total disability" under the Federal Employee's Compensation Act, 5 U.S.C. § 8101 et seq. ("FECA"). This program is

administered by the defendant, the United States Department of Labor.[1] The plaintiff is also entitled to annuity payments pursuant to the Federal Retirement Act, 5 U. S. C. § 8301 et seq. ("FERA"). Both FERA and FECA provide that a claimant may not receive benefits from the two programs simultaneously; one must elect from which program he wishes to receive benefits. However, one may generally switch back and forth at his sole discretion as often as desired.

The plaintiff first received benefit payments for temporary total disability on August 8, 1974. For certain periods of time since then, Mr. Brumley elected to receive benefits under FERA from the Office of Personnel Management ("OPM"). However, on or about February 28, 199l, plaintiff informed OPM [sic note: should read "informed

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[1] FECA is a comprehensive workers' compensation law for federal employees that is designed to provide quick and uniform coverage for work-related injuries. Woodruff v. The United States Department of Labor, 954 F.2d 634 (llth Cir. 1992).

DOL"] that he was electing FECA benefits for the period January 5, 1985, through December 30, 1987. Since that time the defendant has not processed Mr. Brumley's election, which has resulted in plaintiff filing this action to compel the Department of Labor to do so.

The position the DOL now takes in its briefs is that it is not required to process plaintiff's election of benefits unless and until plaintiff fills out it form "CA-8," which inquires into, among other things, a claimant's employment earnings.

The issue Mr. Brumley wishes the Court to address is whether the DOL has statutory authority to require people classified with "total disability" ratings under FECA to report their earnings from employment or self-employment as a condition to their receiving disability benefits under that Act. The defendant's argument in a nutshell is that it has been given by Congress the power to pass whatever regulations it deems necessary to administer its programs and it has the final say on settling disputes, including this one, relating to

those regulations. The plaintiff does not dispute in general the Secretary's authority to promulgate such regulations, nor to "decide all questions arising under" same. 5 U. S. C. § 8145.[2] Instead, plaintiff argues that the particular action the defendant would require of the plaintiff is contrary to the intent of Congress and is not authorized by statute.

* * *

Exceptions to the Preclusion Rule

As mentioned above, the Department points to § 8145 as its statutory authority to "decide all questions arising under" these Acts. It also points to 8128(b) as precluding this Court from reviewing its decisions. This preclusion statute reads as follows:

The action of the Secretary [of Labor) or his designee in allowing or denying a payment under this subchapter is

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[2] That statute reads as follows:

The Secretary of Labor shall administer, and decide all questions arising under, this subchapter (5 U.S.C. § 8101 et seq.). He may --

(1) appoint employees to administer this subchapter; and

(2) delegate to any employee of the Department of Labor any of the powers conferred on him by this subchapter.

5 U.S.C. § 8145..

5 U.S.C. ° 8128(b).

(1) final and conclusive for all purposes and with respect to all questions of law and fact; and
(2) not subject to review by another official of the United States or by a court by mandamus or otherwise.
5 U.S.C. §° 8128(b).

"The language is clear and its meaning unmistakable: Federal courts have no jurisdiction to review final judgments of the Secretary of Labor and his officers... " Staacke v. United States Secretary of Labor , 841 F.2d 278, 281 (9th Cir. 1988) (emphasis added).

In Staacke, the Court of Appeals for the Ninth Circuit discussed the breadth of this preclusion language, but also discussed two exceptions to the rule.

> Significantly, the Supreme Court has singled out section 8128(b) as a model preclusion-of-review statute, noting that Congress uses such "unambiguous and comprehensive" language "when [it] intends to bar judicial review altogether." Lindahl v. Offense of Personnel Management, 470 U.S. 768, 779-80 & n.13.
>
> * * *
>
> Even where the statutory provision absolutely bars judicial review, however, there are two situations where review is nonetheless available: First, courts maintain jurisdiction to consider constitutional claims [citation

> omitted]; and, second, jurisdiction exists where defendant is charged with violating a clear statutory mandate or prohibition

Staacke, 841 F.2d at 281. Accord, Woodruff v. Department of Labor, 954 F.2d 634 (llth Cir. 1992); Sheehan v. United States, 896 F.2d 1168 (9th Cir. 1990); and Owens v. Brock, 860 F.2d 1363, 1367 (6th Cir. 1988) ("Except for cases alleging that the Secretary violated a claimant's constitutional rights or exceeded the scope of his congressional mandate, courts have unanimously held that section 8128(b) prohibits judicial review ...."). But see Paluca v. Secretary, 813 F.2d 524 (lst Cir. 1987), cert. denied sub. nom Roberts v. Secretary of Labor, 484 U.S. 943, 108 S.Ct. 328 (1987) (holding that though a district court has jurisdiction over constitutional challenges to the Secretary's actions administering FECA, no jurisdiction exists to hear challenges based on statutory grounds).

Therefore, in order for this Court to be able to exercise jurisdiction over the instant case, Mr. Brumley's claim must

come under one of these two specific exceptions. Otherwise, the Court has no choice but to dismiss his case.

1. Constitutional claims

Plaintiff argues that though Congress specifically granted the Secretary the authority under 5 U.S.C. § 8106 to order a partially disabled employee to report his earnings from employment, any similar grant of authority is conspicuously absent from the companion statute, § 8105, dealing with people determined to have total disability.[3] He argues that

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[3] The statutes provide:

8105. Total disability

(a) If the disability is total, the United States shall pay the employee during the disability monthly monetary compensation equal to 66 2/3 percent of his monthly pay, which is known as his basic compensation for total disability.

(b) The loss of use of both hands, both arms, both feet, or both legs, or the loss of sight of both eyes, is prima facie permanent total disability.

8106. Partial disability

(a) If the disability is partial, the United States shall pay the employee during the disability monthly monetary compensation equal to 66 2/3 percent of the difference between his monthly pay and his monthly wage earning capacity after the beginning of the partial disability, which is known as his basic compensation for partial disability.

(b) The Secretary of Labor may require a partially disabled employee to report his earnings from employment or self-employment, by affidavit or otherwise, in the manner and at the times the Secretary specifies.

the only possible conclusion that can be drawn is that Congress obviously did not want the DOL to have the authority to make such an inquiry, and in fact has withheld that authority from DOL.

The plaintiff has sometimes characterized his objection as a constitutional one; the Department exercising authority not granted by Congress would be a "separation of powers" type violation. However, the Court believes it more appropriate to view Mr. Brumley's complaint as a charge that the DOL has "violat[ed] a clear statutory mandate or prohibition ...." Staacke, at 281.

If, in the present context, exercising authority withheld by Congress (plaintiff's allegation) is not violating a statutory mandate, then the term has no meaning to this Court. Even if one were to concede that what plaintiff has alleged is technically a constitutional claim as well as a statutory one (as perhaps is true in a broad sense) it clearly is not the type of

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[remainder of section omitted]

constitutional claim found in the reported cases.

For example, in Woodruff, the plaintiff alleged a deprivation of a property interest without due process, as well as a violation of the separation of powers doctrine due to the government's refusal to follow established caselaw. In Paluca, 813 F.2d 524, the lst Circuit found that jurisdiction existed for the district court to consider the merits of plaintiff's equal protection challenge. Mr. Brumley's allegation is nothing like those.

In the context of determining whether jurisdiction exists in FECA complaints brought in district court, appellate courts clearly recognize a distinction between constitutional claims and "statutory" ones. It is the opinion of this Court that if the distinction is to have any meaning, then what constitutes a constitutional claim must involve more than what Mr. Brumley has alleged in this case. Thus, the Court holds that for this Court to have jurisdiction over this cause, the Court must find that the action of the DOL which plaintiff

complains of here violates a "clear statutory mandate or prohibition."

2. Clear statutory mandate or prohibition

The issue before the Court is a limited one:

> Our task is limited to determining whether the statute in question contains a clear command that the Secretary has transgressed. Where, as here, the statute is capable of two plausible interpretations, the Secretary's decision to adopt one interpretation over the other cannot constitute a violation of a clear statutory mandate.

Staacke, 841 F.2d at 282. "Our task is not to develop our own interpretation [of a statute], nor is it to choose the best of two competing interpretations." Woodruff, 954 F.2d at 640.

There seems to be little guidance in the reported cases for determining whether certain statutory language constitutes a "clear statutory mandate or prohibition." The Court is tempted to adopt some variation of Mr. Justice Stewart's "I know it when I see it" test.[4] Perhaps, "if there is any doubt

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[4] Articulated in his concurring opinion in Jacobellis v. Ohio ,378 U.S. 184, 198.

whether the language is 'clear,' then it isn't."

Instead, in making the determination of whether § 8105 and 8106 contain a "clear statutory mandate or prohibition" that has been violated, this Court will consider these factors: the specific language of the statutes purporting to limit the defendant's authority, the context in which those statutes appear in the Act as a whole, and the interpretation of those statutes by other courts.

Examples of cases where a "clear statutory mandate" was violated are Leedom v. Kyne, 358 U.S. 184 (1958) and Oestereich v. Selective Service System, 393 U.S. 233 (1968). In Leedom, the Supreme Court described as "clear and mandatory" a portion of the National Labor Relations Act governing how units of employees for the purposes of collective bargaining would be determined: "the Board shall not decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a

majority of such professional employees vote for inclusion in such unit." Section 9(b) of the Act as quoted in Leedom (emphasis added by the Leedom court).

Nevertheless, on one occasion the Board took such action anyway after refusing to determine whether a majority would vote for such an arrangement. The Supreme Court found that jurisdiction existed to review, and strike down, this action of the Board. " Plainly, this was an attempted exercise of power that had been specifically withheld." Leedom, at 184.

In Oestereich, the Supreme Court found that jurisdiction existed to review a draft board's decision to deny a draft exemption to a divinity student, despite unequivocal language in the Selective Service Act which providing that "[r]egular or duly ordained ministers ... and students preparing for the ministry ... *shall be exempt* from training and service ... under this title." Oestereich, 393 U.S. at 235, quoting Section 6(g) of the Selective Service Act. In both of those cases one can easily appreciate how clear-cut the language at issue was.

Plaintiff argues that in the instant case, language in § 8105 and 8106 purportedly withholding authority from the defendant is just as clear. However, the Court finds that not to be the case. In Leedom and Oestereich, language like "*the board shall not decide*" and "*students ... shall be exempt*" was used by Congress. In the case before this Court, plaintiff asks the Court to infer a statutory prohibition by the "conspicuous absence" of a grant of authority in § 8105 to require earnings information from those totally disabled.

His position that the DOL is acting without Congressional authority when requiring earnings reports from those with total disabilities is chiefly built around the case of United States v. Dorey, 711 F.2d 125 (9th Cir. 1983). As this Court wrote in its previous order, in Dorey a criminal defendant was charged with violating 18 U.S.C. § 1001[5] by making a false

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[5] 18 U.S.C. § 1001 provides:
Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any

statement in a report "*required by section 8106 of Title 5, United States Code.*"[6] The Ninth Circuit reversed his conviction because it determined that the prosecution had failed to prove that Mr. Dorey was required by law to file a report under § 8106.

In so doing, the Court in Dorey compared sections 8105 and 8106. It noted that § 8106 (b) says the "Secretary of Labor may require a *partially disabled* employee to report his earnings from employment ...." (emphasis added) It further noted that "[n]owhere in section 8106 is there any reference

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trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing 'the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

[6] The plaintiff, Mr. Brumley, is not accused of making false or misleading statements to the Secretary, nor is he charged with any sort of crime.

to total disability. Section 8105, however, [addresses total disability]." The Court continued:

> It is also significant that section 8105, which was enacted on the same date as section 8106, does not authorize the Secretary of Labor to require totally disabled person [sic] to report his or her earnings from employment or self-employment. It is obvious then that when Congress wishes to give the Secretary of Labor the authority to require a report of employment from a person receiving benefits, it knows how to do so.
>
> We have no hesitancy in concluding that section 8106 by its terms does not permit the Secretary of Labor to require a temporarily totally disabled person to file a report.

Dorey, 711 F.2d at 127-128 (emphasis in original).

Standing alone and read broadly, Dorey would suggest at least one Court of Appeals believes the language of §§ 8105 and 8106 to be quite clear regarding whether the Secretary has statutory authority to require earnings reports from those with total disabilities. However, the Ninth Circuit has since written that "Dorey is a narrow decision, limited to its own facts." United States v. Austin, 817 F.2d 1352, 1354 (9th Cir. 1987).

The Court in Austin pointed out that defendant Dorey was charged with making a false statement on a "*report required by section 8106 ....*" Because § 8106 requires no report from one totally disabled, Dorey's conviction was overturned. However, the defendant in Austin was simply charged with making a false statement on a form required by the Department of Labor. His conviction was affirmed because, in order to allege a violation of § 1001, "the government is not required to prove that the defendant had a duty under some other statute to disclose." Id., at 1354.

The Ninth Circuit had distinguished Dorey the same way in U.S. v. Olson, 751 F.2d 1126 (9th Cir. 1985) and U.S. v. DeRosa, 783 F.2d 1401 (9th Cir. 1986). In Olson, the Court pronounced that "§ 1001, by itself, required Olson to disclose the information he has been accused of withholding." 751 F.2d at 1128; accord United States v. Kappes, 936 F.2d 227 (6th Cir. 1991).

In Austin, the defendant argued on appeal that the trial

court had committed error in allowing the introduction into evidence of the Department's operating manual, which presumably directs department officials to require those with temporary total disabilities to submit earnings reports. Austin argued that the manual was in conflict with § 8105. The Ninth Circuit disagreed and emphasized the language of § 8105(a) which states that the employee will be paid monthly compensation "during the disability." "Thus, it is implicit in the statutory scheme for the Department to make inquiries to determine whether the disability or dependency has ended." 817 F.2d at 1355.

The Court finds this language of the Ninth Circuit to be significant. It seems a fair inference that that court, while not repudiating Dorey entirely, has at least retreated to, the position that even if the Department has no right under § 8106 to require earnings reports from those temporarily totally disabled, it can still require them pursuant to an implied authority under § 8105.

* * *

In summary, plaintiff wishes the Court to find that § 8105 and 8106 of Title 5, United States Code contain a clear, unmistakable statutory mandate or prohibition, within the meaning of applicable caselaw, that forbids the defendant from requiring plaintiff and others similarly situated to report their earnings before their benefits will be paid to them. There is no explicit language to that effect in the statute. Rather, the Court would have to infer the prohibition from the absence of an explicit grant of authority to require said information. The Court will not do so.

Furthermore, the holding in the case the plaintiff chiefly relies on to support his "mandate by inference" theory has subsequently been limited by the deciding court to its own facts. Also, consideration of the Act as a whole allows a reasonable inference that Congress was aware that some people are only disabled temporarily and the Department would need some sensible means of determining when, or to

what degree, those disabilities later ceased. The Court concludes that no clear statutory mandate or prohibition is being violated by the defendant.

Because the plaintiff has neither alleged a substantial constitutional claim, nor properly shown the defendant has violated a clear statutory mandate or prohibition, this Court is without jurisdiction to hear plaintiff's claim. The "master" of the words of 5 U.S.C. §§ 8105 and 8106 is the Secretary, not this Court. It is he who shall supply them with whatever meaning he wishes.[7]

According, it is hereby

ORDERED that the defendant's motions for reconsideration

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[7] "When I use a word, " Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean -- neither more nor less."
"The question is," said Alice, "whether you can make words mean so many different things."
"The question is," said Humpty Dumpty, "which is to be master- that's all."

Lewis Carroll, *Through the Looking-Glass, (1872)*

and for dismissal are granted; the plaintiff's motion for summary judgment is denied. All other pending motions are thereby rendered moot.

S\
Elsijane Roy
United States District Judge

August 3 , 1993